



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 26, 1995

Ms. Alesia L. Sanchez
Legal Assistant
Legal and Compliance, 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR95-226

Dear Ms. Sanchez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29041.

The Texas Department of Insurance (the "department") received a request for various information concerning a former employee including the employee's personnel file and all paper work pertaining to the employee's termination. You say that the department will release some of the requested information. However, you assert that portions of the requested information are excepted from required public disclosure under sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information made confidential by law. You assert that this exception in conjunction with the informer's privilege and the common-law right to privacy applies to two memoranda, one pertaining to information about a sexual harassment claim, and another pertaining to the receipt of personal mail at the office.

Section 552.101 applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

The memorandum pertaining to a sexual harassment claim contains some identifying information that the department must withhold based on section 552.101 and the common-law right to privacy. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). We have marked the memorandum accordingly. The memorandum about personal mail does not contain private information. Thus, the department may not withhold it based on the common-law right to privacy.

We next consider the application of the informer's privilege. The informer's privilege permits a governmental body to protect from disclosure the identity of an individual who reports a violation of the law to a law-enforcement agency or to administrative officials having a duty of inspection of law enforcement within their particular spheres. *See Open Records Decision No. 515 (1988)*. The memorandum pertaining to the receipt of personal mail at the office does not contain an allegation of a violation of law, but rather an allegation of conduct that is contrary to agency policy; therefore, the informer's privilege does not apply to this document. *See Open Records Decision No. 515 (1988)*.

We consider whether the informer's privilege applies to the portion of the memorandum pertaining to information about a sexual harassment complaint that we have not determined is protected from required public disclosure based on the common-law right to privacy. We conclude that said portion does not contain information that is protected by the informer's privilege.

Section 552.103 of the Government Code excepts from required public disclosure information that relates to pending or reasonably anticipated litigation to which a governmental body is a party. *See Open Records Decision No. 588 (1991)*. You assert that the department expects to be made a party to a lawsuit filed by the former employee.

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. *Open Records Decision No. 518 (1989)*. A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See Open Records Decision No. 331 (1982)*. There must be some objective indication that the potential party intends to follow through with the threat.

You enclosed a copy of a letter from the former employee's attorney and state that this letter is evidence that litigation on this matter will ensue. In her letter, dated July 7, 1994, the employee's attorney cites law that would entitle the employee to damages from the department. The attorney offers a complete settlement of the employee's claims against the department, but states that [i]f we are not able to reach a prompt resolution of these matters, I will advise . . . [my client] to seek the full remedies allowed by law and the courts."

We conclude that the department has demonstrated that litigation is reasonably anticipated in this instance. Thus, the department may withhold the requested information based on section 552.103 of the Government Code.

We note that if the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349, 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Having concluded that the department may withhold the requested information based on sections 552.101 and 552.103, we need not address your claims under section 552.107(1) or section 552.111. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 29041

Enclosures: Marked documents

cc: Ms. Judith Mitchell
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(w/o enclosures)